

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

WYATT V. DRIVERS MGMT.

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RODNEY WYATT, APPELLANT AND CROSS-APPELLEE,
V.
DRIVERS MANAGEMENT, INC., APPELLEE, AND ST. PAUL TRAVELERS
INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

Filed October 18, 2011. No. A-10-1130.

Appeal from the Workers' Compensation Court. Affirmed.

Tony Brock, of Brock Law Offices, P.C., for appellant.

Daniel R. Fridrich, of Werner Enterprises, Inc., for appellee Drivers Management, Inc.

Shirley K. Williams and Katherine S. Vogel, of Knudsen, Berkheimer, Richardson &
Endacott, L.L.P., for appellee St. Paul Travelers Insurance Company.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Rodney Wyatt appeals from the order of the three-judge review panel of the Workers' Compensation Court which affirmed in part and reversed in part the single judge's award of benefits to Wyatt in his claim against his employer, Drivers Management, Inc. (DMI), and St. Paul Travelers Insurance Company (Travelers). Travelers has cross-appealed. This appeal involves two accidents and injuries and a medical history spanning 20 years. At the time of Wyatt's first accident and injury, Travelers provided workers' compensation insurance coverage to DMI, but by the time of Wyatt's second accident and injury, DMI was self-insured. Accordingly, among other things, this case involves a dispute between DMI and Travelers as to liability for Wyatt's condition after he reached maximum medical improvement (MMI) for the second injury. For the reasons that follow, we affirm.

BACKGROUND

Wyatt was employed by DMI as an over-the-road truckdriver on February 5, 1988, when he sustained a C7-T1 fracture of his neck in a work-related accident after falling from his flatbed trailer. Following the injury, Wyatt developed neck pain as well as pain in his hand and forearm. Wyatt underwent spine fusion surgery on his cervical spine on February 11. An EMG performed after the surgery showed a C8 bilateral radiculopathy. Wyatt continued to have neck, hand, and arm pain throughout 1988. Dr. Mark Griffith examined Wyatt on August 9, 1988, at which time Wyatt complained of numbness, tingling, and weakness “in [his] fourth and fifth digits, in the right forearm in the ulnar region.” Griffith noted in November that an EMG and nerve study performed on Wyatt was normal, so it was appropriate to continue conservative treatment of the C8-T1 radiculopathy.

In early 1989, Wyatt successfully participated in a work hardening program and completed a functional capacity evaluation (FCE), demonstrating he could work in the heavy demand category. Griffith released Wyatt to return to work on April 6, 1989. After returning to driving a truck, Wyatt continued to complain of bilateral numbness, tingling, and cramping in his hands and pain and stiffness in his neck. According to Griffith, Wyatt reached MMI on September 11, 1989. Combining the impairment for the neck and upper extremities, Griffith assigned Wyatt a 20-percent permanent partial impairment to the body as a whole.

In connection with the 1988 injury and workers’ compensation claim, Wyatt was found to be temporarily totally disabled from February 6, 1988, through April 13, 1989. Travelers fully paid Wyatt for this period of temporary total disability, and Travelers also paid Wyatt for a 20-percent permanent partial disability from April 14, 1989, through November 5, 1993.

At some point in 1990, Wyatt determined that the weakness in his hands, the pain in his neck, and his decreased total strength made it too difficult to drive a flatbed truck. As a result, he switched to DMI’s vans division, which was significantly less demanding than the flatbed division.

The medical records in this case are quite extensive and include numerous doctor visits and treatments between the time Wyatt reached MMI for his first accident and injury and the time of his second accident and injury, which records we do not detail here. From 1990 through 2000, Wyatt’s neck pain never ceased, but he continued to work while taking anti-inflammatory medication. Throughout this time, he also had numbness and tingling in his arms, ring fingers, and pinkie fingers.

Sometime in 2003, Wyatt began driving a truck with a rougher suspension and experienced greater pain in his elbows, arms, hands, and wrists. On November 17, Wyatt left work and sought medical treatment from Dr. Bruce Stelmak. Wyatt complained of chronic pain and burning in his hands and cervical soreness in the C8 region. EMG and nerve conduction testing was performed and revealed bilateral carpal tunnel syndrome and bilateral ulnar neuropathy as well as the previously documented cervical radiculopathy. In his November 17 notes, Stelmak described the situation as “complex” and expressed his belief that Wyatt’s then current symptoms were mostly related to bilateral carpal tunnel syndrome. Stelmak did not feel that Wyatt should continue his heavy work level and driving a truck, unless he could tolerate the discomfort. Wyatt continued driving for DMI until March 20, 2004. Dr. Vidya Jain performed

surgeries on Wyatt for his bilateral carpal tunnel syndrome and ulnar nerve entrapment in June and September.

Jain referred Wyatt to Dr. Yili Zhou for pain management. Wyatt's first visit with Zhou was on February 18, 2005, at which time Wyatt informed Zhou that his cervical fusion had helped his neck pain but did not resolve his arm pain and that his hand pain was somewhat relieved after the 2004 surgeries. Wyatt's pain in his neck, arms, and hands decreased from 8 out of 10 to 4 or 5 out of 10 by July and remained at a similar level, well-controlled with medication, during subsequent visits with Zhou from 2005 through September 2007.

Dr. Eric Scott performed an independent medical evaluation of Wyatt on February 14, 2005. Scott noted that Wyatt had been maintained in a temporary total disability status by one of his doctors until 2 weeks prior to the appointment, when he was placed in a light-duty status. Scott opined that Wyatt's then current problems were related to the 1988 work injury and "predominantly involve[d] a post-cervical laminectomy syndrome and persistent pain syndrome from his spinal cord/nerve root injury."

Wyatt underwent an FCE on March 17, 2005. The examiner determined Wyatt's restrictions and concluded that Wyatt was able to perform "Light PDC" work but concluded that Wyatt was unable to perform the regular duties of a truckdriver at the time of the examination. Scott reviewed the FCE and concurred with its conclusions. In a letter to Wyatt's attorney on March 6, 2006, Scott opined that Wyatt's impairment ratings and current work restrictions were the direct result of the February 1988 work injury.

Dr. Peter Cimino examined Wyatt for Travelers in November 2007. Cimino opined that Wyatt reached MMI for the 1988 accident 1 year after that accident, that Wyatt's "current symptoms and problems are related to a chronic repetitive trauma that has led to bilateral nerve conditions in both hands that is currently being addressed by the 2003 claim," and that Wyatt had also reached MMI for the "2003 event." Cimino further opined that the "FCE done on March 3, 198[9] accurately reflects what restrictions are attributed to the 1988 accident" and that "changes in the FCE that are demonstrated on March 17, 2005, are attributed to the repetitive trauma due to driving in the years following the recovery in 1989."

Dr. Michael O'Neil examined Wyatt in November 2007 at DMI's request. O'Neil indicated that he was unsure if Wyatt ever actually had carpal tunnel syndrome, but opined that if he did have carpal tunnel, it was exacerbated by driving a truck over the years. O'Neil opined that Wyatt was at MMI for the carpal tunnel effective February 14, 2005, when he was examined by Scott. O'Neil opined further that Wyatt did not have any permanent partial impairment or work restrictions due to the bilateral carpal tunnel syndrome, because the EMG and nerve conduction studies performed in January 2008 were negative for any residual carpal tunnel syndrome. O'Neil did not believe Wyatt needed further medical treatment for his "possible" bilateral carpal tunnel syndrome. He felt Wyatt's ongoing complaints were related to the 1988 radiculopathy.

Wyatt underwent another FCE on June 24, 2008, which documented Wyatt's continued neck, hand, and arm symptoms and placed him in the sedentary-light physical demand level of work for an 8-hour day.

In an August 2008 report, Jain opined that "[a]fter release, . . . if [Wyatt's] symptoms persist, then probably they can be assigned to the neck."

In a letter to Travelers' attorney, dated October 27, 2008, Scott noted:

After reviewing these records [including Wyatt's deposition, records from Jain, and several independent medical examinations], it is my opinion that [Wyatt's] original 1988 accident is the cause of his chronic neck pain and residual radiculopathy. However, the new elbow and hand complaints that developed during the 2003 time frame and continue are caused by or were aggravated by the continued driving from 1990 through 2003. Thus, though, he had residual cervical myelopathy/radiculopathy from his original neck injury[,] the subsequent years of driving a truck have at least aggravated those symptoms and resulted in the carpal tunnel syndrome and ulnar neuritis described in the records.

In addition to the physical symptoms documented above, Wyatt's current claim also includes a mental health component. In September 27, 2006, Dr. Umesh Mhatre diagnosed Wyatt with depression resulting from the constant pain caused by his injuries. By January 2007, Mhatre noted that Wyatt's depression was fairly well controlled with medication and had improved. Mhatre issued two causation reports. In the first, dated February 20, 2008, Mhatre stated that it would be difficult for him to respond to the question of whether Wyatt's depression and anxiety arose out of his 2003 injury. Mhatre noted that he did not see Wyatt until 3 years after the 2003 injury and that he was unaware of Wyatt's mental status prior to that injury. He noted that Wyatt had multiple stressors besides his injuries, including financial difficulties and other health issues. Mhatre felt, however, that Wyatt's injury did contribute to his anxiety and depression. In his second report, dated September 4, 2008, Mhatre stated:

It is also clear that his constant pain is a primary cause of his depression. [Wyatt] reports being happy with his career in trucking and he took great pride in his job. His current debilitated state has damaged his sense of self and he feels that instead of being a contributing member of his family he's become a burden. The dramatic reduction in physical ability in combination with the constant pain has created a situation in which he feels he cannot escape. Clearly, too, while he and his wife have in the past been comfortable with economic benefits from working, the loss of income has been a tremendous hardship.

Mhatre noted that while medication had been "fairly successful" in controlling Wyatt's symptoms, his depression had not disappeared and continued to have "a significant impact on his ability to cope on a daily basis." On October 6, Mhatre found that Wyatt had "moderate limitations" on most elements of a mental status checklist and had a "marked limitation" with regard to his "ability to be aware of work hazards and take appropriate precautions," "ability to interact appropriately with the general public," and "ability to ask questions and request assistance."

Dr. George M. Joseph, a psychiatrist, performed an independent medical examination of Wyatt on October 31, 2008. Joseph believed that Wyatt was at MMI from a psychiatric standpoint; noted that Wyatt had a global assessment of functioning score of 60, which was typical of patients with moderate psychiatric disorders who are capable of working; and stated his opinion that Wyatt was not restricted from work from a psychiatric standpoint.

There are several loss of earning power reports in the record that are relevant to our review on appeal. As of September 5, 2007, Kristi Deardorff concluded, based on the 2005 FCE

information and Scott's opinions, that Wyatt was employable but had sustained an approximately 70-percent loss of earning capacity. In a supplemental report dated April 23, 2008, Deardorff elaborated:

[I]f consideration is given to the restrictions outlined by the March 2005 [FCE] and to the opinions of [Scott], [Wyatt] is employable but has sustained a loss of earning capacity of approximately 70% as a result of his [1988] on the job injury. If consideration is given to the opinions that have been expressed by [Cimino], [Wyatt] has sustained a 70% loss of earning capacity as a result of the . . . 2003 "accident" and no loss of earning capacity as a result of the [1988] accident. If consideration is given to the opinions that have been expressed by [O'Neil] and to the results of the March 1989 FCE, [Wyatt] has sustained no loss of earning capacity as a result of his [1988] injury.

Deardorff was later provided with Mhatre's September 2008 report, Jain's August 2008 report, and the June 2008 FCE report. Based on this additional information, giving consideration to Jain's opinion and his assignment of restrictions, Deardorff opined that Wyatt's loss of earning capacity had increased to approximately 80 percent primarily due to an increase in his loss of access in the labor market. She did not specifically delineate whether this was attributable to the injuries that Wyatt had sustained in 1988 or 2003. In a letter to Wyatt's attorney dated October 9, 2008, Deardorff noted Mhatre's opinion that Wyatt's depression and anxiety were causally related to the 1988 work injury. After reviewing the mental status checklist completed by Mhatre, Deardorff stated her opinion that, considering the limitations associated with Wyatt's depression and anxiety, combined with his physical limitations, Wyatt was not presently employable.

Alfred J. Marchisio provided a rebuttal report on October 28, 2008, in which he opined that Wyatt was permanently and totally disabled from resuming any occupation in his local labor market.

On November 20, 2008, Karen Stricklett (Deardorff's supervisor at the time she provided her opinions) provided a supplemental loss of earning capacity rebuttal report. Stricklett restated the opinion that Wyatt's loss of earning capacity, considering Jain's restrictions, was approximately 80 percent. She noted the disagreement between Mhatre and Joseph as to whether Wyatt's depression and anxiety would preclude him from working. She also noted the difficulty had by the various physicians who had evaluated Wyatt in determining whether his restrictions resulted from the 1988 accident, an aggravation, or a completely separate event in 2003. Stricklett stated, "As a result, I am unfortunately not able to conclusively determine which event has resulted in [Wyatt's] loss of earning capacity."

In a rebuttal report dated November 21, 2008, Paulette Freeman opined that Wyatt's loss of earning power as a result of the 1988 injury was between 65 and 75 percent. Freeman disagreed with Deardorff and Stricklett primarily with respect to the effect of Wyatt's depression on his loss of earning capacity. Freeman was unable to find facts to support a conclusion that Wyatt's depression was untreatable and that he was unemployable as a result of his depression. Freeman did not believe that the mental status checklist from Mhatre was reliable and stated that it should not be used in determining Wyatt's loss of earning power.

Vocational counselor Ron Schmidt opined on November 22, 2008, in his rebuttal report that Wyatt had no loss of earning capacity from the 1988 injury. He noted various medical opinions that Wyatt's elbow and hand complaints that developed in 2003 were aggravated by continued driving from 1990 through 2003. Schmidt stated, however, that if it was determined that Wyatt's current limitations were a result of the 1988 injury, or if it was determined that the 2003 accident resulted in a whole body injury, then Wyatt would have an overall loss of earning capacity of 55 percent.

Wyatt filed the operative petition in the workers' compensation court on March 1, 2007. He alleged a work-related accident and neck injury occurring in February 1988 as well as an "aggravation and acceleration" of his injuries as a result of "the constant vibration, gripping of the steering wheel, and various repetitive, constant duties involved in long haul trucking," for which he sought medical attention in November 2003.

In their responsive pleadings, both DMI and Travelers asserted cross-claims, alleging that each of them paid benefits for which the other might be responsible and accordingly sought reimbursement of any such benefits the court determined to be the other defendant's responsibility.

Trial was held before a single judge of the compensation court on November 24, 2008. At the start of trial, the parties stipulated, among other things, that Travelers had the insurance coverage for the February 5, 1988, accident and injury; that DMI was self-insured under the Nebraska Workers' Compensation Act by at least November 17, 2003; and that temporary total disability for the November 2003 accident commenced on March 20, 2004. They also stipulated to Wyatt's average weekly wage at the time of each accident.

The single judge entered an award of benefits on May 8, 2009. With respect to the second accident, the single judge found that on November 17, 2003, Wyatt

suffered injury to his bilateral carpal tunnels and bilateral ulnar nerves as the result of a repetitive trauma accident arising out of and in the scope and course of his employment by [DMI] when the continual vibration from the steering wheel and gearshift of the trucks he drove, particularly over the last year, resulted in his having to leave work and seek medical treatment.

The judge found that Wyatt was temporarily totally disabled from March 20, 2004, through February 13, 2005, and that following surgical treatment for these injuries, Wyatt had no permanent partial disability for these scheduled member injuries. The judge awarded temporary total disability benefits for this time period. The judge found that DMI had made indemnity payments, but that a small amount remained unpaid, resulting in an award of an attorney fee of \$2,000, a 50-percent penalty, and interest.

With regard to the balance of Wyatt's claim "for a worsening of the injuries and symptoms" arising out of the 1988 accident, any associated loss of earning power, and his claim of depression, the single judge made various factual findings, citing the opinions of Jain and Scott in particular, culminating in his conclusion that these injuries were the result of the 1988 accident and therefore the responsibility of Travelers. The court stated:

The essence of all the medical reports in this case indicate that [Wyatt's] original injury which required a fusion of his neck at the C8-T1 level involved an injury to the

same nerves that are involved in carpal tunnel syndrome and ulnar nerve entrapment. As a result, there is some confusion about whether or not the new injury (as this Court has found above) to the carpal tunnel and ulnar nerves which is the responsibility of [DMI], continued to act as a causative element both for the worsening of the original C8-T1 radiculopathy and for [Wyatt's] depression. This Court finds that the injuries for which [DMI] is responsible (the second accident) did not operate in any way as a causative agent for [Wyatt's] ongoing problems after [he] reached [MMI] with no permanent impairment for his bilateral carpal tunnel syndrome and bilateral ulnar nerve entrapment on February 14, 2005.

[Wyatt's] condition after February 14, 2005, was due to a worsening of his neck condition and related radiculopathy due to the vibration he experienced from truck driving for [DMI] and culminated with his having to leave work and seek medical treatment on or about November 17, 2003.

The single judge rejected Travelers' argument that this worsening of Wyatt's condition was an aggravation and was therefore DMI's responsibility. Applying the Nebraska Supreme Court's reasoning in *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987), to this case, the judge found that Wyatt's "continuing to drive a truck and experiencing the vibrations from the steering wheel and gear shift, was not an independent intervening cause of the worsening of [his] long term cervical radiculopathy. This worsening of [Wyatt's] condition was a recurrence of the same condition with worsening symptoms." Accordingly, the judge found Travelers was responsible for insurance coverage for Wyatt's condition following his reaching MMI on February 14, 2005, for the bilateral carpal tunnel syndrome and ulnar nerve entrapment.

With respect to Wyatt's depression, the single judge found that this had been caused by the original neck injury, relying upon Mhatre's opinion expressed in his report of September 4, 2008. The judge found that Wyatt's depression as treated was not causing any permanent impairment over and above what he was experiencing from the physical restrictions established by the latest FCE.

With respect to loss of earning power, the single judge found that Deardorff's opinion that Wyatt had an 80-percent loss of earning power was valid and had not been rebutted. The court found this opinion correct because, as it had already determined, the restrictions from and after February 14, 2005, were from the 1988 accident and injury and Wyatt's depression as treated added no restrictions or limitations to his employability. The judge concluded that the injury to Wyatt's body as a whole worsened, and has now resulted in a loss of earning power of 80 percent, of which 20 percent was paid following the 1988 accident. The judge found that Travelers was responsible for paying permanent partial disability to Wyatt and that Travelers was entitled to credit for indemnity payments made to Wyatt for the February 1988 injury.

The single judge found that on September 5, 2007, when Deardorff rendered her opinion that Wyatt suffered a 70-percent loss of earning power, there was no reasonable controversy with respect to Wyatt's permanent partial disability for the first injury for at least this 70-percent loss of earning power, noting Freeman's rebuttal report of November 21, 2008, opining that Wyatt's loss of earning power was between 65 and 75 percent. The judge concluded that Travelers was therefore responsible for a 50-percent penalty on the difference between the 70-percent and the

20-percent loss of earning power already paid to Wyatt, together with an attorney fee of \$11,959 and interest.

Following entry of the award, DMI and Travelers sought review by a three-judge review panel of the compensation court, and Wyatt cross-appealed. The review panel entered an order of remand on review on November 13, 2009. The review panel found that the single judge had stated two inconsistent and contradictory findings. The first is that Wyatt's chronic neck pain and the worsening of his cervical radiculopathy was due to his original 1988 accident, and the second is that it was due to the vibration he experienced from truckdriving for DMI culminating with his having to leave work and seek medical treatment on or about November 17, 2003. Accordingly, the review panel remanded the matter to the single judge for the elimination of the perceived inconsistency.

The single judge entered an order on remand on May 10, 2010. The judge stated:

After reviewing the entirety of the voluminous evidence in this case once again, it is the clarification of this Court that although not worded in a very clear manner[,] what the evidence shows in this case and what this Court meant to say . . . is that the vibrations [Wyatt] received while truck driving for [DMI] caused a recurrence of [his] neck conditions which chronically worsened over time up through and beyond the time when [Wyatt] ceased driving a truck because of the separate and unrelated cumulative trauma injury with an accident date of November 17, 2003. [Wyatt's] continued symptoms after he attained [MMI] from this second accident on February 14, 2005, was all as a causal result of the original accident of February 5, 1988.

The judge concluded that the result remained the same in that Travelers was responsible for insurance coverage and payment of indemnity and medical benefits for Wyatt's condition after he reached MMI on February 14, 2005.

On November 1, 2010, following a second appeal, the review panel entered an order of affirmance in part, and reversal in part, on review. The panel affirmed the determination of liability for Wyatt's current condition, his loss of earning capacity, and his disability. The panel reversed the award of penalties, attorney fees, and interest against Travelers, finding that a reasonable controversy did exist with respect to Wyatt's loss of earning capacity. The panel noted Deardorff's April 2008 report, wherein she stated that if consideration was given to the opinions expressed by O'Neil and the results of the March 1989 FCE, Wyatt had sustained no loss of earning capacity as a result of his February 1988 injury. The panel also stated that Deardorff's opinion may have lost some of its strength because of a change in opinion by O'Neil as noted by Stricklett in her report of November 20, 2008, and went on to note Schmidt's opinion that Wyatt had no loss of earning capacity from the 1988 injury. The panel found that Schmidt's opinion created a reasonable controversy and that thus, the trial judge erred in awarding penalties and fees for partial nonpayment of compensation for an earning power loss caused by the 1988 injury.

Wyatt subsequently perfected his appeal to this court, and Travelers has cross-appealed.

ASSIGNMENTS OF ERROR

Wyatt asserts that the trial judge erred in (1) finding that his current disability is not due to the 2003 accident; (2) failing to find that he is permanently totally disabled as a result of his

injuries, including his depression; and (3) apportioning his 1988 impairment with the 2003 whole body disability. Wyatt also asserts that the review panel erred in reversing the trial judge's finding that Travelers was liable for a late payment penalty, interest, and an attorney fee.

On cross-appeal, Travelers asserts that the review panel and trial judge erred in (1) finding that the 1988 accident was the cause of Wyatt's alleged injuries after he reached MMI from the 2003 accident in February 2005, rather than finding that the years of truckdriving and/or the 2003 accident was the cause; (2) holding Travelers responsible for the payment of any benefits for Wyatt's conditions after he reached MMI in February 2005; (3) finding that the 1988 accident, rather than years of truckdriving and/or the 2003 accident, was the cause of any psychological claim; (4) failing to correct inconsistencies in the first award after remand; (5) determining that Wyatt was entitled to any loss of earning capacity; (6) awarding anything above a zero-percent loss of earning capacity, even if there was an entitlement to an award; and (7) failing to find additional bases in the record for a reasonable controversy besides just Schmidt's report.

STANDARD OF REVIEW

Under Neb. Rev. Stat. § 48-185 (Reissue 2010), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009).

In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong. *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.* The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law. *Id.*

ANALYSIS

Causation for Medical Symptoms After February 2005.

Wyatt and Travelers both assign error to the trial judge's finding that Wyatt's current disability is due to the 1988 accident rather than the 2003 accident. Travelers also asserts the trial judge erred in holding Travelers responsible for the payment of any benefits for Wyatt's conditions after he reached MMI in February 2005. What is at issue here is whether Wyatt's ongoing symptoms after February 2005 are causally related to the 2003 accident, making DMI responsible for the payment of benefits, or to the 1988 accident, making Travelers responsible. Or, framed another way, the question is whether Wyatt's ongoing symptoms are due to an aggravation or a recurrence of the 1988 injury. When a subsequent injury aggravates a prior injury, the insurer at risk at the time of the subsequent injury is liable. *Miller v. Meister & Segrist*, 255 Neb. 805, 587 N.W.2d 399 (1998); *Miller v. Commercial Contractors Equip.*, 14

Neb. App. 606, 711 N.W.2d 893 (2006). But, if the subsequent injury is a recurrence of the prior injury, the insurer at risk at the time of the prior injury is liable. *Id.*

Where there have been two accidents to an employee, the question of whether the disability sustained by him should be attributed to the first accident or to the second accident depends on whether or not the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). If the second injury is but a recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury. *Id.* In *Mendoza*, the Nebraska Supreme Court, quoting 4 Arthur Larson, *The Law of Workmen's Compensation* §§ 95.22 and 95.23 (1987), stated:

“There is . . . a fine line separating aggravations from recurrences

“In order to find that there has been an aggravation, it must be shown that the second episode contributed independently to the final disability. Also, there must have been a second ‘injury’ as that term is used in the jurisdiction. . . .

“If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. . . . This group . . . includes the kind of case in which a worker has suffered a back strain, followed by a period of work with continuing symptoms indicating that the original condition persists, and culminating in a second period of disability precipitated by some lift or exertion.”

225 Neb. at 782, 408 N.W.2d at 287.

In the present case, it is undisputed that Wyatt suffered a work-related accident and injury to his neck in 1988 when he fell from his truck. The 1988 accident and injury resulted in a 20-percent impairment rating to Wyatt's body as a whole. Wyatt has suffered ongoing neck, arm, and hand pain as a result of the injury to his neck. It is also undisputed that Wyatt suffered a second accident and cumulative trauma injury in 2003 due to the vibrations from driving a truck over the years, resulting in bilateral carpal tunnel and ulnar nerve injuries. The trial judge found that Wyatt suffered no permanent impairment as a result of this second accident and injury, and that finding has not been challenged on appeal. The record shows that after Wyatt reached MMI for the 2003 accident and injury in 2005, he continued to suffer chronic neck pain and residual neuropathy in his hands and arms. The trial judge found that in addition to causing Wyatt's bilateral carpal tunnel and ulnar nerve injuries, the vibrations from driving a truck over the years led to a recurrence of the 1988 injury, that Wyatt's symptoms of chronic neck pain and residual neuropathy after February 2005 were attributable to the 1988 accident, and that thus, Travelers was responsible for paying benefits for the resulting disability.

The trial judge's finding is supported by the opinion of Jain, who opined that if Wyatt's symptoms persisted after his carpal tunnel and ulnar nerve release surgeries, his ongoing symptoms could be attributed to his neck injury. The judge's finding is also supported by Scott, who opined that Wyatt's original 1988 accident was the cause of his chronic neck pain and residual radiculopathy. If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from

substituting its view of the facts for that of the compensation court. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). Because there is sufficient evidence to support the trial judge's findings regarding the causation for Wyatt's medical symptoms after February 2005 and Travelers' responsibility for the payment of related benefits, those findings are not clearly erroneous and the review panel did not err in affirming those findings.

Causation for Psychological Symptoms.

Travelers asserts that the trial judge and review panel erred in finding that the 1988 accident, rather than years of truckdriving and/or the 2003 accident, was the cause of Wyatt's psychological claim. As set forth above, the trial judge's determination that Wyatt's ongoing medical symptoms after February 2005 were caused by the 1988 accident was not clearly erroneous. With respect to Wyatt's depression, the trial judge relied on Mhatre's statement that Wyatt's constant pain is a primary cause of his depression. Although Wyatt suffered an increase in his symptoms in 2003 attributable to a second accident and injury, the record is clear that Wyatt suffered some degree of pain from the time of his 1988 accident through the time of trial. It is also clear that he continued to experience pain after his bilateral carpal tunnel syndrome and ulnar nerve injuries resolved in February 2005. The trial judge's finding of causation for Wyatt's depression is supported by Mhatre's opinion, coupled with Jain's and Scott's opinions regarding the causation for Wyatt's continued pain after February 2005, and is not clearly erroneous.

Permanent Total Disability.

Wyatt asserts that the trial judge erred in failing to find him permanently and totally disabled as a result of his injuries, including his depression. The trial judge declined to find Wyatt permanently and totally disabled, stating that when properly treated, Wyatt's depression was not a hindrance to employment. The review panel affirmed this determination, finding no clear error.

Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. *Id.* It does not mean a state of absolute helplessness but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Id.*

Wyatt's current restrictions and the various opinions about the effect of Wyatt's depression on his employability and his loss of earning capacity are well documented in the background section of this opinion, so we decline to restate them here. As discussed further below, the trial judge's determination that Wyatt suffered an 80-percent loss of earning capacity is supported in the record, as is the finding that Wyatt's depression does not render him permanently and totally disabled. The trial judge's finding that Wyatt is not permanently and totally disabled is not clearly erroneous.

Apportionment of 1988 and 2003 Injuries.

Wyatt asserts that the trial judge erred in apportioning his 1988 impairment with the 2003 whole body disability. To be apportionable, an impairment must have been independently producing some degree of disability before an accident and must be continuing to operate as a

source of disability after the accident. *Martinez-Najarro v. IBP, Inc.*, 12 Neb. App. 504, 678 N.W.2d 114 (2004). In terms of the test for determining when apportionment is appropriate, the term “disability” contemplates impairment of earning capacity, not functional disability. *Id.* The problem of apportionment may be encountered between an employer and an employee when disability from a prior injury contributes to a claimant’s total disability following a subsequent injury. *Id.*

We disagree with Wyatt’s assertion that the trial judge apportioned his loss of earning capacity rating. Travelers made some indemnity benefit payments to Wyatt at the time of the 1988 accident and injury. The trial judge found Wyatt’s 80-percent loss of earning capacity entirely attributable to the original 1988 accident and simply gave Travelers credit for the indemnity payments already made in connection with the 1988 accident and injury. Such a credit was necessary to prevent a double recovery. Wyatt’s assignment of error is without merit.

Order on Remand.

Travelers asserts that, after remand, the trial judge erred in failing to correct inconsistencies in the initial award as ordered by the review panel. Because we have already noted, in the background section of this opinion, the language identified by the review panel as problematic and the clarifying language used by the trial judge on remand, we do not restate that language here. We simply note that the order on remand shows that the trial judge determined that the vibration from driving a truck resulted in (1) the new medical conditions of bilateral carpal tunnel syndrome and bilateral ulnar neuropathy and (2) a recurrence of the symptoms of Wyatt’s chronic neck condition. We find no inconsistency in this determination. We have addressed the issues of causation and aggravation versus recurrence above and decline to address those issues further here. Travelers’ assignment of error is without merit.

Loss of Earning Capacity.

Travelers takes issue with the trial judge’s loss of earning capacity determination. Travelers argues that Wyatt stopped working in 2004 because of his hands and not because of symptoms in his neck, that the area of impairment is to his upper extremities, and that he is statutorily not entitled to a loss of earning capacity.

A determination as to an injured worker’s loss of earning capacity is a question of fact to be determined by the Workers’ Compensation Court. *Ladd v. Complete Concrete*, 13 Neb. App. 200, 690 N.W.2d 416 (2004). Loss of earning power or capacity is the means by which a physical impairment to the body as a whole is measured for the purpose of determining the benefits due under the act; there can be no loss of earning power or capacity in the absence of a physical impairment to the body as a whole. *Snyder v. IBP, Inc.*, 222 Neb. 534, 385 N.W.2d 424 (1986). Under Neb. Rev. Stat. § 48-121 (Reissue 2010), impairments to the body as a whole are compensated in terms of loss of earning power or capacity, but impairments of scheduled members are compensated on the basis of loss of physical function. *Snyder v. IBP, Inc.*, 235 Neb. 319, 455 N.W.2d 157 (1990). The test for determining whether a disability is to a scheduled member or to the body as a whole is the location of the residual impairment, not the situs of the injury. *Id.*

There is evidence in the record to support that Wyatt suffered a 20-percent permanent partial impairment to the body as a whole as a result of the 1988 accident. We have already

determined that the trial judge's finding that Wyatt suffered a recurrence of the 1988 injury was not clearly erroneous. There is also evidence in the record to support the trial judge's conclusion that Wyatt suffered an 80-percent loss of earning power. Travelers' assignments of error are without merit.

Reasonable Controversy.

Wyatt asserts that the review panel erred in reversing the trial judge's finding that Travelers was liable for a late payment penalty, interest, and attorney fees. Travelers asserts that the trial judge and review panel erred in failing to find additional bases in the record for a reasonable controversy besides just Schmidt's report.

Neb. Rev. Stat. § 48-125 (Reissue 2010) requires an employer to pay the 50-percent waiting-time penalty in the following circumstances: if (1) the employer fails to pay compensation within 30 days of the employee's notice of a disability and (2) no reasonable controversy existed regarding the employee's claim for benefits. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). A reasonable controversy may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Id.* Whether a reasonable controversy exists under § 48-125 is a question of fact. *Id.*

Wyatt's 1988 injury was to his body as a whole. When Wyatt's temporary total disability ended in 1989, Travelers paid benefits based on a 20-percent whole body impairment. In the present case, the trial judge found that Wyatt suffered an 80-percent permanent loss of earning power, but, based on opinions by Deardorff and Freeman, the trial judge found no reasonable controversy that Wyatt suffered at least a 70-percent loss of earning power. Accordingly, the trial judge found Wyatt entitled to additional compensation for nonpayment to him of this additional 50-percent loss of earning power. In reversing this decision and finding a reasonable controversy, the review panel cited Schmidt's opinion that Wyatt suffered no loss of earning capacity as related to the 1988 injury, as well as Deardorff's opinion of no loss of earning capacity if O'Neil's opinion was adopted. We find no error in the review panel's determination. Because the review panel correctly reversed the trial judge's finding with respect to a reasonable controversy, there is no need to address Travelers' additional assignment of error on cross-appeal concerning the issue of reasonable controversy.

CONCLUSION

The single judge did not err in finding that Wyatt's medical symptoms, including his psychological symptoms, after February 2005 were caused by the 1988 accident and ordering Travelers to pay benefits for Wyatt's resulting disability; in finding that Wyatt was not permanently and totally disabled; and in assigning an 80-percent loss of earning capacity. The review panel did not err in affirming these determinations. The review panel did not err in

finding that a reasonable controversy existed with respect to Wyatt's loss of earning capacity and in reversing the single judge's award of penalties, attorney fees, and interest against Travelers.

AFFIRMED.